LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 10 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1203

BORG-WARNER CORPORATION,

Petitioner,

vs.

REPUBLIC GEAR COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

AARON LEWITTES,
135 East 42nd Street,
New York, N. Y. 10017.

EDWARD I. ROTHSCHILD,
105 South La Salle Street,
Chicago, Illinois.
Attorneys for Respondent.

Of Counsel:

SIDNEY BENDER,
MELVIN I. MISHKIN,
LEVENTRITT, LEWITTES & BENDER,
ROTHSCHILD, HART, STEVENS & BARRY.

Dated: April 9, 1969.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

PAGE

Counter-Statement of Questions Presented 1

Counter-Statement of the Case 2

A. Petitioner Purposely Caused York To Repudiate The Contract Which Was Lawful Under The Antitrust Statutes. And In The District Court It Did Not Prove, And Waived, Any Alleged Immunity For That Wrong, Under The Antitrust Statutes 2

B. Petitioner Was On Notice For More Than 15 Months Before Trial That The Illinois Rule of Damages, Not That Of Brazil, Would Govern The Illinois Tort 3

ARGUMENT:

I. It Is Settled Law That The Antitrust Statutes Were Not Intended To, and Do Not, Prohibit State Laws Such As One Making It Tortious To Purposely Induce Repudiation Of A Lawful Contract 5

A. Under *Parker* v. *Brown*, 317 U. S. 341, Petitioner's Contention, That The Decisions Below Conflict With The Antitrust Statutes, Is Without Merit 5

B. There Was Also A Total Failure Of Proof Of Violation Of The Antitrust Statutes 7

C. Petitioner's Point I, Not Having Been Raised In The District Court Nor Passed On There Or By The Court Of Appeals, Is Not Open Here 7

PAGE

II. The Court Of Appeals' Decision Clearly Did Not Deprive Petitioner Of A Fair Hearing 8

A. Since Illinois Law Concededly Determines Whether Petitioner's Conduct Is Tortious, That Law Also Governs Damages 8

B. The District Court's Correct Holding, More Than 15 Months Before Trial, That Illinois Law Would Govern Damages For The Illinois Tort, Did Not Prejudice Petitioner 9

C. The Decision Below Does Not Conflict With Decisions Of This And Other Courts 10

Conclusion 11

CASES CITED

Allstate Insurance Co. v. Lanier, 361 F. 2d 870 (C. A. 4) 6

Bender v. Hearst Corp., 263 F. 2d 360 (C. A. 2) ... 8

Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 381, 87 Atl. 927 6

Hicks v. Guinness, 269 U. S. 71 9

Joseph E. Seagram & Sons v. Hostetter, 384 U. S. 35 6

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487 .. 8

Krock v. Electric Motor & Repair Co., 327 F. 2d 213 (C. A. 1), cert. den. 377 U. S. 934 8

Olsen v. Smith, 195 U. S. 332 6

Parker v. Brown, 317 U. S. 341 ..... 5, 6

PAGE

Sears Roebuck & Co. v. Stiffel Co., 376 U. S. 225 6

Sperry & Hutchinson Co. v. Louis Weber & Co., 161 Fed. 219 (N. D. Ill.) 6

Wiggins Airways, Inc. v. Mass. Port Authority, 362 F. 2d 52 (C. A. 1) 6

OTHER AUTHORITIES

A.L.I. Restatement, Conflict of Laws (1934), § 412, pp. 493-4 8

Federal Rules of Civil Procedure, Rule 46 8

2 Harper & James, Law of Torts (1956) § 30.2, p. 1687 8

Prosser on Torts (3d ed. 1964), 954-5 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1203

BORG-WARNER CORPORATION,

Petitioner,

vs.

REPUBLIC GEAR COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counter-Statement of Questions Presented

The U. S. District Court sitting in Illinois held, and the U. S. Court of Appeals on appeal unanimously affirmed, that the evidence was sufficient to support the jury's verdict:

(a) that petitioner had purposely caused another to breach its lawful contract with respondent, a tort in Illinois under whose conflicts rule its own law of liability concededly governs; and

(b) in accordance with the Illinois law of damages for such tort, that petitioner pay respondent compensatory damages in the sum of $400,000.

The questions presented are:

1. Is it not settled law that the antitrust statutes were not intended to, and do not, authorize restraint of such State rules and government action?

2. The Illinois conflicts rule being that Illinois law governs whether there is tort liability, did not both Courts below correctly hold that the Illinois conflicts rule requires that Illinois law also govern the damages for such tort?

3. Where the District Court had originally mistakenly ruled over respondent's objection that Brazil law would govern damages for the Illinois tort but more than a year and a quarter before the trial started, corrected that error and ruled, in accordance with respondent's contention, that Illinois law would govern damages for the Illinois tort, did not both Courts below correctly hold that that correction of error was not prejudicial to petitioner?

Counter-Statement of the Case

A. Petitioner Purposely Caused York To Repudiate The Contract Which Was Lawful Under The Antitrust Statutes. And In The District Court It Did Not Prove, And Waived, Any Alleged Immunity For That Wrong, Under The Antitrust Statutes.

Petitioner's statement of the material facts blithely ignores the substantial evidence supporting the jury verdict, much of which is referred to in or underlies the Opinion of the Court of Appeals (App. A to Pet.). The evidence and the verdict establish the following:

There was an existing license from respondent Republic to York, of which petitioner Borg-Warner had knowledge, for York's manufacture and sale in Brazil of gears under respondent's registered trade name "Republic". Petitioner wanted to use York's facilities, for its own trade name to

the exclusion of respondent's, in the Brazil gear market and petitioner knew that York was interested in a license covering both transmission and gears as much more lucrative than the license from respondent covering only gears. Petitioner therefore, at its Chicago, Illinois headquarters, purposely induced York to repudiate the license from respondent by offering it the more lucrative transmissions and gear license. This wrongful inducement was a substantial, proximate cause of York's act of repudiation, also in the United States, of its contract with respondent.

In the District Court petitioner withdrew its third affirmative defense, that the contract was illegal under the antitrust laws (App. 43, 10), and its fourth affirmative defense, that respondent was in a combination in violation of the antitrust laws (App. 43, 10). Although it did not formally withdraw its fifth affirmative defense, item (a), that it was privileged to induce York to repudiate the contract with respondent because respondent had "sought to impose upon" York a "relationship" in violation of the antitrust laws (App. 43-4), it offered no evidence in support of that defense, proposed no jury instructions respecting the same, and did not include such defense in its motions as a ground for dismissal, directed verdict, or judgment n.o.v., or for new trial.

Neither did it contend in the District Court that judgment against it for inducing breach of respondent's contract would violate the antitrust laws because it was in competition with respondent.

B. Petitioner Was On Notice For More Than 15 Months Before Trial That The Illinois Rule of Damages, Not That Of Brazil, Would Govern The Illinois Tort.

At one point before trial, on December 8, 1965, the District Court had decided, over respondent's objections, that the law of Brazil would govern damages (App. 1181, App. B to Pet.) even though both parties had agreed that the law of

Illinois determined "whether Borg-Warner's conduct subjected it to liability to Republic" (App. A to Pet., A-11).* As to this original notion that Brazil law would govern damages for an Illinois tort, the Court of Appeals held (App. A to Pet., A-11):

> "It is implicit, however, in the court's later actions that this point of view was abandoned."

This conclusion is amply borne out by the facts.

A further pre-trial hearing took place on February 11, 1966 at which there was an extended discussion of the extent to which Brazilian law would be applied and during which respondent Republic again sought to restrict its scope (App. 1196-7). The outcome of that hearing was the Order of February 11, 1966 granting the petitioner's motion for a separate trial of Brazilian law "limit[ed] . . . to the existence or non-existence of a contract at the time of the alleged tortious conduct of the defendant [petitioner]" (App. 51).

The separate trial on Brazil law commenced on June 13, 1966. At that time the District Court observed that the purpose of the hearing was to "determine whether or not there was a contract in existence that could be breached by determining what the Brazilian law in regard to contracts was" (App. 143-4). No evidence or argument was submitted at this hearing on Brazil law as to the Brazilian law of damages for the tort of inducing a breach of contract.

Trial on the merits commenced before a jury on June 5, 1967, more than 15 months after the February 11, 1966 order (App. 439). Respondent was permitted to introduce evidence on damages under Illinois law, much of it set forth or referred to in the opinion of the Court of Appeals

---

* In accordance with petitioner's contention, and over respondent's objection, the existence of the contract was determined by reference to the law of Brazil (App. A to Pet., A-8-9).

(see App. A to Pet., A-9-11), over petitioner's objection based on the December 8, 1965 order (App. 601), in light of respondent's contention that the February 11, 1966 pretrial order limited the Brazilian law issue to that of existence of the contract and respondent's further contention that the parties so understood (App. 601-2).

After the jury returned its verdict of $400,000 for the respondent, petitioner moved for judgment n.o.v. or new trial. In the argument on the motion, petitioner did not deny respondent's observation that one purpose of the February 11, 1966 order was to eliminate from the case the issue of Brazilian law of damages (App. 1196-7). The District Court confirmed that observation by denying the motion for judgment n.o.v. or new trial.

Petitioner did not at any point ask for additional time to prepare a defense on damages under Illinois law, nor did it at any time make an offer of proof on the damage issue, whether under Illinois or Brazil damage law.

ARGUMENT

I. It Is Settled Law That The Antitrust Statutes Were Not Intended To, And Do Not, Prohibit State Laws Such As One Making It Tortious To Purposely Induce Repudiation Of A Lawful Contract.

A. Under *Parker* v. *Brown*, 317 U. S. 341, Petitioner's Contention, That The Decisions Below Conflict With The Antitrust Statutes, Is Without Merit.

The gist of petitioner's contention is that its causing York to repudiate respondent's contract is competition favored by the antitrust statutes and therefore may not be declared tortious; that Illinois by making that a tort has in "effect" "required" the petitioner and respondent to "conspire to allocate customers or territories" (Pet. 10). Contrary to petitioner's contention, it is settled law

that the lower courts' determination that petitioner's inducement is a tort does not restrain competition in violation of the antitrust laws. *Parker* v. *Brown,* 317 U. S. 341; *Olsen* v. *Smith,* 195 U. S. 332; *Wiggins Airways, Inc.* v. *Mass. Port Authority,* 362 F. 2d 52 (C.A. 1); *Allstate Insurance Co.* v. *Lanier,* 361 F. 2d 870 (C.A. 4).

In *Parker* v. *Brown, supra,* this Court held that in view of their "words and history", the antitrust laws "must be taken to be a prohibition of individual and not state action." 317 U. S., at 352. That case permitted California to "restrict competition among the growers and maintain prices in the distribution of their commodities to packers." 317 U. S., at 346.

A fortiori the lower courts, acting pursuant to long-established Illinois law in accordance with the prevailing common law rule, did not run afoul of the antitrust laws by adjudging that the petitioner's purposeful inducement of a breach of a lawful contract, so as to substitute itself for respondent, was tortious. Public policy favors the security of contracts, for which a party has furnished valuable consideration, against such expropriation. *Cumberland Glass Mfg. Co.* v. *De Witt,* 120 Md. 381, 87 Atl. 927, 932; *Sperry & Hutchinson Co.* v. *Louis Weber & Co.,* 161 Fed. 219, 221, 222 (N. D. Ill.); Prosser on Torts (3d ed. 1964), 954-5.

As the Supreme Court stated in holding that New York's Alcohol Beverage Control Law does not conflict with the antitrust laws, quoting an earlier case, the "teaching of this Court's decision enjoins seeking out conflicts between state and federal regulation where none clearly exists." *Joseph E. Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 45. There is certainly no "clear conflict" (*id.*) between State protection of lawful contracts against private expropriation and the antitrust laws' prohibition against private monopolies and private combinations in restraint of trade.

Petitioner's reliance on *Sears Roebuck & Co.* v. *Stiffel Co.,* 376 U. S. 225, is misplaced. There the Court held that where Congress says a lamp shall not be patented, the State

may not give the owner "the equivalent of a patent monopoly" (233). Since both federal patent law and state law were in clear conflict in that case, the state law there had to give way. But since the history and language of the antitrust laws negate application to state sovereign action, the state is just as free under the antitrust laws to protect a lawful contract from purposeful inducement by a nonparty of a party's repudiation of it as it is to protect the contract directly from a party's repudiation.

B. There Was Also A Total Failure Of Proof Of Violation Of The Antitrust Statutes.

Furthermore, there was a total failure of proof in the District Court that the effect of a judgment against petitioner would be to restrain trade in interstate commerce unreasonably, in violation of the antitrust laws. Thus, for example, the contract was simply a license to use respondent's trademark in Brazil, it was concededly lawful in itself, and no showing at all was made that it was put to any use by respondent that would be condemned by the antitrust laws.

Contrary to petitioner's contentions (Pet. 9-11), the decision below did not condemn its attempt to enter into the Brazil market or to deal with York or to compete with respondent; nor did it compel any allocation of markets. It only condemned petitioner's knowing and purposeful causing of York to repudiate a lawful contract with respondent —this, of course, is no extension of the "tort beyond its customary limits" (Pet. 12) as the discussion and authorities in the Opinion of the Court of Appeals testify (App. A to Pet., A-6-7); many more cases in accord could be cited.

C. Petitioner's Point I, Not Having Been Raised In The District Court Nor Passed On There Or By The Court Of Appeals, Is Not Open Here.

As we have noted above (3), petitioner's Point I—that the common law tort of inducing a breach of con-

tract must be eliminated as in conflict with the antitrust laws, at least where inducer and victim are competitors—was not raised in the District Court nor passed on by the District Court or Court of Appeals. It is therefore not open to petitioner in this court. F.R.C.P. Rule 46; e.g., *Krock* v. *Electric Motor & Repair Co.*, 327 F. 2d 213 (C.A. 1), cert. den. 377 U. S. 934, where the Court held as follows (217):

> "The public, generally, has an interest in the speedy determination of litigation, and it is inimical to that interest not to raise until appeal what could have been considered before."

II. The Court Of Appeals' Decision Clearly Did Not Deprive Petitioner Of A Fair Hearing.

A. Since Illinois Law Concededly Determines Whether Petitioner's Conduct Is Tortious, That Law Also Governs Damages.

There is no merit to petitioner's contention (Pet. 17) that *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, was not followed. As noted above (3-4), the parties agreed that under the Illinois conflicts rule, Illinois' substantive law determines whether petitioner's conduct is tortious (App. A to Pet., A-11). "[I]t follows", as the Court of Appeals held (*id.*), "that the Illinois law governing damages also applies." Accord: *Bender* v. *Hearst Corp.*, 263 F. 2d 360, 365, 368 (C.A. 2); A.L.I. Restatement, *Conflict of Laws* (1934), § 412, pp. 493-4; 2 Harper & James, *Law of Torts* (1956), Sec. 30.2, p. 1687.

That "[u]nder Illinois conflict of laws rules, damages *for breach of contract* are governed by the law of performance which in this case is Brazil"—as petitioner argued, Pet. 17—is completely beside the point; the Court of Appeals pointed out (App. A to Pet., A-12):

> "This action, however, is against Borg-Warner for damage done by a tort committed in 1959 and subject

to the law of Illinois. But for the tort, Republic would presumably have had the benefit of its contract as royalties became due from time to time, and it would presumably have converted the royalties received at any time in cruzeiros into dollars at the then current rate of exchange. The fact that the damages for the tort are measured by the value of the contract, and its value in turn by its probable proceeds, does not convert this action into an action to recover an obligation payable in cruzeiros."

Accord:

Hicks v. *Guinness,* 269 U. S. 71, 80.*

B. The District Court's Correct Holding, More Than 15 Months Before Trial, That Illinois Law Would Govern Damages For The Illinois Tort, Did Not Prejudice Petitioner.

Contrary to petitioner's contentions, the Court of Appeals did not "reverse . . . a pretrial order" (Pet. 2), or "repudiat[e] a pretrial order" (Pet 14), or "retroactively chang[e] the ruling after trial" (Pet. 19). The

---

* There, the Supreme Court stated the following with respect to an obligation payable in the United States and so governed by our law:

> "The American firm had a claim here . . . for damages in dollars. . . . It had a right to say . . . we want the dollars to which we have a right by the law here in force. . . . The event has come to pass upon which your liability becomes absolute as fixed by law. . . . There is no doubt that this rule prevails in actions for a tort, *Preston* v. *Prather,* 137 U. S. 604."

In our case, as in *Hicks,* respondent's claim is to damages in dollars, because the claim against petitioner is governed by our law, not that of a foreign country. In our case, no conversion in general is necessary because the obligation sued on was to compensate respondent for its loss of dollars arising out of petitioner's tort committed in Illinois.

District Court had reversed itself long before trial and the District Court and Court of Appeals found the record bare of any showing of prejudice to petitioner thereby.

As shown above (3-5), petitioner was on notice for more than 15 months before trial that the Illinois rule of damages, not that of Brazil, would govern the Illinois tort. Petitioner never asked for more time to prepare any further defense on damages and made no offer of proof in that connection.

Clearly, the District Court and the Court of Appeals were correct in holding that petitioner suffered no prejudice in connection with the timely, pre-trial determination to apply the Illinois law of damages to the Illinois tort.

C. The Decision Below Does Not Conflict With Decisions Of This And Other Courts.

Contrary to petitioner's contention (Pet. 16-17), which it seeks to bolster by a misleadingly incomplete quotation from the opinion of the Court of Appeals, that Court did not "switch . . . the burden of proof to Borg-Warner" on "foreign law" respecting the "Brazilian law of damages". The Court of Appeals answered petitioner's "conten[tion]", that it need not show the Brazil law on damages because it "relies on a failure of proof by" respondent on that issue (App. A to Pet., A-11), by holding that the Brazilian law of damages was immaterial and therefore there was no such failure of proof. Thus, the Court of Appeals held, explicitly, "that the Illinois law governing damages also applies" (App. A to Pet., A-11) and that the action is not one "to recover an obligation payable in cruzeiros" (App. A to Pet., A-12).

Since the decision of the Court of Appeals was bottomed on the immateriality of Brazil damage law, and not on any holding as to burden of proof, the decision is plainly not in conflict with the decisions petitioner cites (Pet. 16) on the burden of proving foreign law.

CONCLUSION

The petition for certiorari states no reason which could justify a review by this Court of the decision of the Court of Appeals. The petition should, therefore, be denied.

Respectfully submitted,

AARON LEWITTES,
135 East 42nd Street,
New York, N. Y. 10017.

EDWARD I. ROTHSCHILD,
105 South La Salle Street
Chicago, Illinois.
Attorneys for Respondent.

Of Counsel:

SIDNEY BENDER,
MELVIN I. MISHKIN,
LEVENTRITT, LEWITTES & BENDER,
ROTHSCHILD, HART, STEVENS & BARRY.

Dated: April 9, 1969.